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27 Corp., and Oracle EMEA Ltd.

28 UNITED STATES DISTRICT COURT

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ORACLE USA, INC., a Colorado corporation,
5 ORACLE INTERNATIONAL CORPORATION,
6 a California corporation, and ORACLE EMEA
7 LIMITED, an Irish private limited company,

8 Plaintiffs,
9 v.

10 SAP AG, a German corporation, SAP
11 AMERICA, INC., a Delaware corporation,
12 TOMORROWNOW, INC., a Texas corporation,
13 and DOES 1-50, inclusive,

14 Defendants.

15 Case No. 07-CV-1658 PJH (EDL)

16 **ORACLE'S ALTERNATIVE
17 NOTICE OF MOTION AND
18 MOTION TO FILE STIPULATED
19 AMENDED COMPLAINT;
20 MEMORANDUM OF POINTS AND
21 AUTHORITIES IN SUPPORT**

22 Case No. 07-CV-1658 PJH (EDL)

23 ORACLE'S ALTERNATIVE NOTICE OF MOTION AND MOTION TO FILE STIPULATED AMENDED
24 COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

NOTICE OF STIPULATED MOTION TO AMEND**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

NOTICE IS HEREBY GIVEN THAT on August 19, 2009 at 9 a.m. or as soon thereafter as possible, in Courtroom 5 of the above entitled Court, Plaintiffs Oracle USA, Inc., Oracle International Corp., and Oracle EMEA Ltd. (collectively, "Plaintiffs" or "Oracle"), by and through their attorneys of record, will move for leave to file a Fourth Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2) and paragraph five of the June 11, 2009 Stipulated Revised Case Management and Pretrial Order ("2009 Case Management Order"). Oracle seeks amendment to assert additional copyright registrations and allegations against the same Defendants, SAP AG, SAP America, Inc., and TomorrowNow, Inc. (collectively, "Defendants," and together with Oracle, "Parties"), based on the discovery of facts related to Oracle's Siebel product line and post-litigation conduct. The Parties have stipulated to this amendment. In the 2009 Case Management Order, the Court ordered that this Motion be filed by July 15, 2009.

This Alternative Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities that follows, the 2009 Case Management Order, any pleadings, records, and papers on file in this matter, and such other and further oral and documentary evidence and legal memoranda as may be presented at any hearings.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 15(a)(2) and paragraph five of the 2009 Case Management Order, Oracle moves to amend its Third Amended Complaint in the stipulated form attached to this Alternative Motion as Exhibit A (Oracle's [Proposed] Fourth Amended Complaint for Damages and Injunctive Relief). This stipulated amendment adds an additional plaintiff and additional copyright registrations related to Defendants' alleged infringement of Oracle's Siebel software, and allegations relating to Defendants' continuing course of infringement of Oracle's PeopleSoft, J.D. Edwards, and Siebel software for eighteen months after Oracle first brought this lawsuit.

1 In addition, pursuant to the Court's direction at the May 28, 2009 Case
 2 Management Conference, Oracle has concurrently filed a contested motion to further amend its
 3 Third Amended Complaint. Through the concurrently-filed contested motion, Oracle seeks
 4 leave to add certain additional new and previously obtained copyright registrations to conform to
 5 proof, but no additional parties and no additional claims for relief. Accordingly, Oracle has also
 6 filed its preferred version of its proposed Fourth Amended Complaint, attached as Exhibit A to
 7 the contested motion. That version of the proposed Fourth Amended Complaint includes both
 8 the stipulated and contested amendments.

9 For efficiency, Oracle respectfully requests that the Court consider the
 10 concurrently-filed contested motion to amend first. If the Court grants that motion, the resulting
 11 filed Fourth Amended Complaint will include the stipulated amendments that are the subject of
 12 this Alternative Motion, and this Motion will be moot. Alternatively, if the Court denies
 13 Oracle's concurrently-filed motion to amend, then Oracle requests that the Court grant this
 14 Alternative Motion pursuant to the Parties' stipulation and the Court's 2009 Case Management
 15 Order.

16 **II. FACTUAL BACKGROUND**

17 **A. Oracle's Prior Amendments**

18 Oracle filed its initial Complaint on March 22, 2007. On June 1, 2007, Oracle
 19 filed its First Amended Complaint to include copyright registrations related to Oracle's
 20 PeopleSoft and JD Edwards product lines. A year later, after discovery revealed additional facts
 21 about the scope of Defendants' copyright infringement, Oracle filed its Second Amended
 22 Complaint on July 28, 2008 to include, among other things, additional copyright registrations.
 23 Later that year, on October 8, 2008, Oracle filed its Third Amended Complaint, this time solely
 24 to adjust the identities of Oracle's Plaintiff entities.

25 **B. Oracle's Stipulated Amendment**

26 Since Oracle filed its Third Amended Complaint, through discovery Oracle has
 27 learned facts that it contends show Defendants' copyright infringement extended beyond the
 28 PeopleSoft and JD Edwards products lines to include Oracle's Siebel software. Oracle has also

1 discovered facts that it contends show Defendants infringed Oracle's PeopleSoft, JD Edwards,
 2 and Siebel software for eighteen months after Oracle filed its initial Complaint.¹

3 With these new claims in mind, and with a case schedule that had become
 4 unworkable for both Parties, in March 2009, the Parties began a two-month meet and confer
 5 process to reach an agreement and stipulation to, among other things, (1) allow Oracle to amend
 6 its complaint to add Siebel claims, allegations regarding post-litigation infringement, additional
 7 PeopleSoft copyright registrations, and a copyright claim for infringement of Oracle's
 8 copyrighted Database software; (2) jointly move to modify and extend the case schedule; and (3)
 9 increase the number of summary judgment motions to be filed. The Parties were able to reach an
 10 agreement and joint stipulation with respect to some, but not all, of these issues. However, the
 11 Parties agreed that Oracle should be permitted to file an amended Complaint to include Siebel
 12 and post-litigation allegations, and Defendants agreed not to oppose such a motion. On May 12,
 13 2009, the Parties filed a joint Stipulation to Modify May 5, 2008 Case Management Order that
 14 reflected the Parties' agreement.

15 At the May 28, 2009 Case Management Conference, the Court, among other
 16 things, agreed to allow Oracle to move to amend its Complaint to add Siebel claims and
 17 allegations related to Defendants' post-lawsuit activities. On June 11, 2009, the Court signed the
 18 2009 Case Management Order, permitting Oracle to file this Motion to File a Stipulated
 19 Amended Complaint.

20 **C. The Contested Amendment**

21 At the May 28, 2009 Case Management Conference, Oracle also informed the
 22 Court of its desire to include certain additional allegations in its Fourth Amended Complaint to
 23 which Defendants had not stipulated. Oracle also informed the Court of Defendants' refusal to

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25 ¹ More recently, Oracle has also discovered that Defendants' infringement and
 26 unauthorized downloading extend to include Oracle's copyrighted Database software.
 27 Defendants' infringement of Oracle's Database software, and Oracle's desire to amend its
 28 complaint to add those allegations, is addressed in detail in the concurrently-filed contested
 Motion to Amend.

1 stipulate to these additions. With respect to the contested amendment, the Court directed Oracle
 2 to file a separate motion.

3 **III. THE COURT SHOULD GRANT LEAVE TO AMEND**

4 Defendants have consented and stipulated to this amendment, and the Court has
 5 given Oracle leave to file this Motion. Accordingly, pursuant to Rule 15(a)(2), the Court should
 6 grant the stipulated amendment if it denies Oracle's concurrently-filed motion to amend.
 7 "Denial is proper only when amendment would be clearly frivolous, unduly prejudicial, cause
 8 undue delay or a finding of bad faith is made." *United Union of Roofers, Waterproofers, and*
 9 *Allied Trades No. 40 v. Ins. Corp. of America*, 919 F.2d 1398, 1402 (9th Cir. 1990). That is not
 10 so here. The additional allegations are not frivolous, as they concern additional related copyright
 11 infringement. There is no evidence of bad faith or undue delay. Oracle only learned about these
 12 additional allegations through the course of discovery on Oracle's current claims, and properly
 13 brought those claims to the attention of Defendants and the Court when sufficient facts to
 14 support these new claims had been confirmed.

15 Oracle requests that the Court consider its concurrently-filed contested motion
 16 first, so that Oracle may file a single amended complaint (as reflected in the Exhibit to the
 17 contested motion) that includes all of Oracle's new allegations together. If the Court denies that
 18 motion, Oracle requests the Court grant this Alternative Motion per the Parties' Stipulation and
 19 the Court's 2009 Case Management Order.

20 DATED: July 15, 2009
 21

BINGHAM McCUTCHEN LLP

22 By: _____ /s/ Geoffrey M. Howard
 23 _____
 24 Geoffrey M. Howard
 25 Attorneys for Plaintiffs
 Oracle USA, Inc., Oracle International Corporation, and
 Oracle EMEA, Ltd.
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